

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1085 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PRAMOD HARIPRASAD TIWARI

Versus

STATE OF GUJARAT

Appearance:

MR SAURIN A SHAH for Petitioner

Mr.M.A.Bukhari, A.P.P.,for respondent

CORAM : MR.JUSTICE S.M.SONI

Date of decision: 14/03/96

ORAL JUDGEMENT

Petitioner, accused of sec.20(b) of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and sec.66(1)(b) and 65(a) of the Bombay Prohibition Act, was arrested on 14.2.95. On 18.5.95, petitioner-accused filed an application for bail on the ground that period of 90 days as contemplated under sec.167(2) of the Code of Criminal Procedure, 1973 ('Code' for short) from the

date of his arrest has expired and as the chargesheet is not filed, he is entitled to be released on bail on default of the prosecuting agency and he be ordered to be released on bail. Said application was heard and finally decided on 25.5.95 and came to be rejected on 30.5.95 by the learned Addl.Sessions Judge, Valsad. It is stated that in the meantime i.e. on 24.5.95, chargesheet came to be submitted. It will be relevant to state that the petitioner-accused has also submitted an application before the learned Addl.Sessions Judge with a request to prevent the investigating agency not to file chargesheet till the disposal of his bail application. However, it appears that no order is passed on the said application, as it appears that that application must have become infructuous in view of the fact that the chargesheet is submitted before the court.

Learned Addl. Sessions Judge by his order dated 30.5.95 rejected the said bail application, being Criminal Misc. (Bail) Application no.303 of 1995. The petitioner herein being aggrieved by the said judgment and order and also claiming an independent right of being released on bail, has filed this application.

Learned Advocate Mr.Shah has raised two important questions before this court, namely, (i) what would be the position if after the expiry of the prescribed time as envisaged under sec.167 of the Code an application has submitted before the competent court and during the pendency of the said application i.e. before the decision of the application, the chargesheet is submitted ?; and (ii) Can the inaction on the part of the concerned court take away the absolute right of the accused, which is vested by the legislative command and not the court's discretion merely on the ground that though the application under sec.167(2) was made immediately after expiry of 90 days, but before the said application could be decided by the concerned court, the investigating agency submitted the chargesheet ?

In view of these contentions, in my opinion, short question that arises before me for consideration is : if an application for bail is filed on expiry of limitation to file chargesheet under sec.167(2) of the Code, whether that right to be released on bail continues even if that application comes to be decided after the chargesheet is filed ? The question, therefore, is, what is the nature on right accruing to the petitioner on expiry of period of limitation to file chargesheet under sec.167(2) of the Code and whether that right subsists even after the chargesheet is filed ? Whether an

application for bail is filed after expiry of period to file chargesheet and before the filing of chargesheet becomes infructuous after the chargesheet is filed if it was not decided by the court ? Second question raised by the learned Advocate is a consequential one, whether the petitioner should suffer for delay by the court in deciding the application before filing of the chargesheet even though it had sufficient time to decide. It will be relevant to refer to section 167(2) of the Code, which reads as under:-

"167(2). The Magistrate to whom an accused person is forwarded under this section may, whenever he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the Police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding

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- (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
- (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;
- (b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;
- (c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the Police.

Explanation I: For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II: If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention".

There are diverse view which require consideration on this point. In the case of Sanjay Dutt vs. State through CBI Bombay (1994) 5 SCC 410, Supreme Court has, after considering the various judgments, has concluded in para 53 (2)(b) as under:-

"The 'indefeasible right' of the accused to be released on bail in accordance with section 20(4)(bb) of the TADA Act read with section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at this stage".

Question before the Supreme Court in Sanjay Dutt's case was whether indefeasible right of the accused to be released on bail in accordance with sec.20(4)(bb) of the TADA Act read with sec.167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time limit is a right which enures to and is enforceable by the accused only from the time of default till the filing of the challan and does not survive or remain enforceable

on the challan being filed ? In view of the said question raised before the Supreme Court, the Supreme, referring to the judgment in the case of Hitendra Vishnu Thakur Vs.State of Maharashtra (A.I.R. 1994 SC 2623), held that it does not survive or remain enforceable on the challan being filed. It is further held, as quoted above , in para 53(2)(b), that if the accused applies for bail under this provision on expiry of the period of 180 days or the extended date, as the case may be, then he has to be released on bail forthwith. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage. This observation is made placing reliance on the judgment in the case of Hitendra Vishnu Thakur. However, from the conclusion of the Supreme Court in Sanjay Dutt's case, it does not become clear whether the application filed for bail on expiry of the statutory period provided under sec.167(2), the right accrued and enured to the accused still continues after the chargesheet is filed.

In Hitendra Vishnu Thakur's case (Supra), Hitendra Thakur surrendered before the Director General of Police, Maharashtra on 5.12.92. On 4.1.93, he was remanded to judicial custody. On 6.7.93, he filed an application for grant of bail under sec.20(4) of TADA Act on the ground that 180 days had expired on 4.6.93 and chargesheet/challan had not been filed. On 12.7.93, Public Prosecutor presented a request of the Investigating Officer dated 29.6.93 to the Designated Court, seeking extension of time to complete the investigation and objections were also filed to the application for bail filed by Thakur. The said application was dismissed by the Designated court on 31.7.93 and the prosecution was granted extension of time till 3.8.93 to file the chargesheet/challan, treating the application of the Investigating Officer as a report of the Public Prosecutor. Supreme Court held that the Investigating Officer had no authority under the provisions of the Act to apply for extension and further held that the extension granted was erroneously granted on improper exercise of the jurisdiction by the Designated court and consequently the order refusing to grant bail was set aside and he was ordered to be released on bail. No doubt, pending the decision of the Supreme Court, the chargesheet had been filed on 26.8.93 and supplementary chargesheet had been filed on 13.12.93. Therefore, it can be inferred from Thakur's case that that right which was tried to be availed of by filing an application

immediately after the expiry of the period for filing chargesheet continues even after the filing of the chargesheet. This view is not confirmed in Sanjay Datt's case. In Sanjay Dutt's case, Supreme Court has held as under:-

"48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if

on the date of return of the rule, the custody of detention is on the basis of a valid order (See Niranjana Singh Nathawan vs.State of Punjab; Ram Narayan Singh vs. State of Delhi and A.K.Gopalan vs.Government of India)".

15.3.96

Learned Advocate for the petitioner has again relied on a judgment in the case of Mohamed Iqbal Madar Shaikh & Ors. vs. State of Maharashtra (1996 (1) Judgment Today (SC) 114). In that case, according to the learned Advocate Mr.Shah, the practice of adjourning the matter by the Judge after filing of an application, which facilitates the investigating agency to file chargesheet, is not approved. He, therefore, contends that in view of these facts, the accused becomes entitled to be released on bail on default by the investigating agency in filing the chargesheet. He also tries to buttress his argument by the following observation of the Supreme Court, namely:-

"Admittedly, no petition for grant of bail after the expiry of the statutory period for the submission of the chargesheet had been filed. There is no statement that any application for grant of bail had been filed on behalf of the appellants under proviso (a) to section 167(2) after the expiry of the statutory period which application was kept pending till 30.8.93. Now, the appellants have forfeited their right to be released on bail under proviso (a) to section 167(2) as they are in custody on basis of orders for remand passed under other provisions of the Code. In such a situation, we are left with no option, but to dismiss these appeals.

Relying on these observations, the learned Advocate Mr.Shah has contended that an application filed for bail under proviso (a) to section 167(2) of the Code ought to have been decided by the court, particularly when an application was filed by the accused requesting the court to prevent the investigating agency from filing chargesheet. It is surprising as to how such a relief can be granted to pause the process of law. Filing of chargesheet is the process of law. Be it in time, be it late, but chargesheet in case of investigation of a cognizable offence on completion of the investigation is required to be filed. Filing of the same cannot be paused or withheld by the order of the court. Question is whether right to be released on bail during default

period continues even after the default is cured, if the court is moved for the same, but has not decided the same during default period ? If that right continued, then Supreme Court in para 12 of Mohamad Iqbal's case (Supra) would not have observed as under:-

"If an accused charged with any kind of offence, becomes entitled to be released on bail under proviso (a) to section 167(2) that statutory right should not be defeated by keeping the applications pending till the chargesheets are submitted, so that the right which had accrued is extinguished and defeated".

In my opinion, if what learned Advocate Mr.Shah wants to urge has any substance, then Supreme Court would have observed that if an accused charged with any kind of offence becomes entitled to be released on bail under proviso (a) to section 167(2), that statutory right would not stand destroyed on the chargesheets being submitted and the right once accrued would not get extinguished or defeated by any event. What is not approved by the court is the adjournment by the courts with a view to facilitate the investigating agency to file chargesheet. Non approval of the said conduct of the court to adjourn the matter does not mean to continue right accrued on default even after the default is cured and accused will have to be released on bail. On default being cured, the custody of accused again becomes in accordance with law, which was not due to default in view of sec.167(2) of the Code. It has been rightly observed in this very judgment in para 11 by quoting Sanjay Dutt's case as under"-

"It is now settled that this right cannot be exercised after the chargesheet has been submitted and cognizance has been taken, because in that event the remand of the accused concerned including one who is alleged to have committed an offence under TADA, is not under section 167(2) but under other provisions of the Code".

The view taken by the Supreme Court in Sanjay Dutt's case is further approved by a Division Bench of the Supreme Court in the case of State of M.P. vs. Rustam and others (1995 SCC (Criminal) 830, where it is observed as under:-

"4.We may also observe that the High court's view in entertaining the bail petition after the challan was filed was erroneous. The matter now stands settled in Sanjay Dutt vs. State in which case Hirendra Vishu Thakur vs.State of

Maharashtra has aptly been explained away. The court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail and not barely on the date of the presentation of the petition for bail. This well settled principle has been noticed in Sanjay Dutt case on the strength of three Constitution Bench cases - Niranjan Singh Nathawan vs.State of Punjab; Ram Narayan Singh vs. State of Delhi and A.K. Gopalan vs.Govt. of India. On the dates when the High Court entertained the petition for bail and granted it to the accused-respondents, undeniably the challan stood filed in court, and then the right as such was not available".

This is further approved by the Supreme Court in the case of Devinderpal Singh vs. Govt. of National Capital Territory of Delhi (1996 SCC (Criminal) 5, where the relevant observations are in paras 16 and 17, which read as under:-

"16. The validity of an order granting extension under clause (bb) of section 20(4) of TADA is to be considered with reference to the facts as existing on the date of the order. Mr.,Sodhi is right in his contention that the order passed by the Designated Court on 12.7.95 without any report of the Public Prosecutor and without even the appellant being produced and informed by the Designated Court that question of grant of extension of the period for completing investigation was under consideration, renders the order granting extension by the Designated court erroneous and it cannot be sustained.

17. This now takes us to the question of grant of bail to the appellant. Learned counsel for the parties state that challan has since been filed on 30.9.95. Learned counsel are at variance about the effect of filing the challan on the right of the appellant to be released on bail. This question was examined in Sanjay Dutt case where it has been laid down that the right to be released on bail for failure to complete the investigation within the prescribed time is not automatic and even if 'indefeasible', it has to be 'availed of' by the accused at the appropriate stage.. "

Thus, to sum up it is clear (1) that 'indefeasible right' is created in favour of the accused, if chargesheet is not filed on expiry of the statutory

period as provided in proviso (a) to sec.167(2) of the Code; (2) No doubt, said right is 'indefeasible right', but the life of that right is from the expiry of the period to file the chargesheet till the date the chargesheet is filed; and (3) That right does not survive or remain enforceable on the chargesheet being filed and the application filed during default period is pending for disposal, same is required to be decided like a regular bail application, be it under Code or any other Act, if it provides for bail like Code.

For the reasons stated above, the petition is liable to be dismissed and is hereby dismissed. Rule discharged.
